

JONATHAN W. BROWN, ESQ. (State Bar No. 223901)
LIPSITZ GREEN SCIME CAMBRIA LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202-3924
(716) 849-1333
Facsimile No.: (716) 849-1315
jbrown@lglaw.com

MARK S. HOFFMAN, ESQ. (State Bar No. 108400)
MARK S. HOFFMAN, A PROFESSIONAL CORPORATION
11845 W. Olympic Blvd., Suite 1000
Los Angeles, CA 90064
Tel. (424) 248-6633
Fax: (424) 248-6677
mark@markshoffmanlaw.com

Attorneys for Plaintiff LFP IP, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LFP IP, LLC,

Plaintiff,

vs.

LEE KEITH BRETT,

Defendant.

Case No.: 2:16-cv-00166-FMO-RAO

**JOINT BRIEF RE: SUMMARY
JUDGMENT MOTIONS**

JOINT BRIEF RE: SUMMARY JUDGMENT

1 Lee Keith Brett
2 17790 Coshocton Road
3 Mount Vernon, Ohio 43050
4 702-467-4817
5 *Pro Se Defendant*
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1
2 **I. Trademark Infringement Claim**

3
4 **A. Plaintiff's Argument: Plaintiff Should Be Granted Summary**
5 **Judgment on its First Cause of Action for Infringement of a**
6 **Registered Trademark (15 U.S.C. § 1114).**

7 As set forth in more detail below, summary judgment should be entered in favor
8 of Plaintiff on its trademark infringement claim. LFP's HUSTLER® registrations
9 are incontestable and provide conclusive evidence that LFP has a protectable
10 ownership interest in the HUSTLER® marks. In this case, Defendant is merely
11 adding the word "American" before LFP's HUSTLER® mark, on identical and/or
12 competing goods.
13

14
15 **1. Plaintiff is the Owner of the HUSTLER® Marks.**

16 The HUSTLER® trademark and service mark has been used by Plaintiff, its
17 affiliates, its licensees and/or its predecessors-in-interest for over forty (40) years.
18 In the early 1970s, the HUSTLER® Mark was first being used in connection with
19 with a string of gentlemen's nightclubs called "The Hustler Club" and an adult
20 entertainment newsletter called *HUSTLER*. Several years after the first publication
21 of the newsletter, the HUSTLER® mark was being used extensively in commerce
22 in connection with a full-length men's magazine with national distribution. In
23 1975, the magazine mark was federally registered in the U.S. (U.S. Reg. No.
24 1011001). (See Joint Appendix of Disputed and Undisputed Facts ("Appx."),
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1 Facts P1 – P4, the Declaration of Larry C. Flynt (“Flynt Decl.”) ¶¶3-5, and
 2 Plaintiff’s **Exhibit A**).

3
 4 In 1975, the year after launching the nationally-distributed HUSTLER®
 5 magazine, the founder and publisher of the magazine, Larry Flynt, purchased nude
 6 pictures of former First Lady Jacqueline Kennedy Onassis while she was
 7 sunbathing on vacation. Flynt published the photographs in the August 1975 issue
 8 of HUSTLER® magazine. That issue attracted widespread attention, and one
 9 million copies were sold within a few days. (Flynt Decl. ¶6). Thereafter, Larry
 10 Flynt and his company, Larry Flynt Publications, grew the magazine and the
 11 HUSTLER® business over the many years and decades ahead.

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 15
 16 In 1988, HUSTLER® magazine defeated a claim for severe emotional
 17 distress and a judgment of approximately \$150,000 by the Reverend Jerry Falwell,
 18 in a unanimous opinion of the United States Supreme Court written by Chief
 19 Justice William Rehnquist. LFP’s business was later immortalized by Hollywood
 20 in 1997 in the Oscar-nominated motion picture, *The People vs. Larry Flynt*, which
 21 offered the story of Larry Flynt and his HUSTLER business empire (Flynt Decl.
 22 ¶¶ 7-8).

23
 24
 25
 26 Beyond the magazine, operations under the HUSTLER mark have expanded
 27 and numerous HUSTLER® marks have been registered in the U.S. and throughout
 28

1 the world (See Appx. P26; Flynt Decl. ¶ 17; P's **Exhibit J**). Among many other
 2 things, LFP launched a clothing line, HUSTLER® apparel in 1998, which has
 3 offered hundreds of original HUSTLER designs featuring the HUSTLER mark on
 4 everything from shirts, shorts, hats, hoodies, and lingerie (HUSTLER®: U.S. Reg.
 5 No. 2689852). (See Appx. P5-P7, P 22; Ryoo Decl. ¶¶ 4-7; P's **Exhibits B, H and**
 6 **I**).
 7
 8

9
 10 Moreover, by 1998, LFP started using the HUSTLER HOLLYWOOD®
 11 mark in connection with a chain of retail stores (HUSTLER HOLLYWOOD® U.S.
 12 Reg. No. 2318186). At present, there are twenty-one (21) HUSTLER
 13 HOLLYWOOD locations throughout the U.S., including stores in: Hollywood,
 14 California; San Jose, California; Las Vegas, Nevada; Tacoma, Washington;
 15 Lexington, Kentucky; Cincinnati, Ohio; Oklahoma City, Oklahoma; Nashville,
 16 Tennessee; San Antonio, Texas; and West Palm Beach, Florida. (See Appx. P8 –
 17 P11; Flynt Decl. ¶12; Plaintiff's **Exhibit C**).
 18
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21
 22 Further, LFP has expanded into broadcasting television channels that
 23 broadcast throughout the world (HUSTLER TV® U.S. Reg. No. 3008950), and
 24 the HUSTLER mark is used in Los Angeles in connection with a casino and card
 25 room (HUSTLER CASINO®: Reg. No. 2479911). The HUSTLER CLUB®
 26 nightclubs (U.S. Reg. No. 2773372) are also found throughout the United States,
 27
 28

1 including but not limited to locations in Baltimore, Maryland; San Francisco,
 2 California; New Orleans, Louisiana; Cleveland Ohio; and New York City. (See
 3 Appx. P13 – P21; Flynt Decl. ¶¶ 14-16; Plaintiff’s **Exhibits E, F and G**).
 4

5 **2. Defendant’s Application and Use of “American Hustler”**

6 **a. Defendant’s Trademark Application was Rejected by the** 7 **USPTO**

8
 9 Defendant Brett filed a service mark application with the United States
 10 Patent and Trademark Office (“USPTO”) for “American Hustler” on or about June
 11 10, 2015. (See Appx. P27-28; Brown Decl. ¶3; Plaintiff’s **Exhibit K**). On
 12 September 9, 2015, Plaintiff filed with the USPTO a Letter of Protest with regard
 13 to Application Serial No. 86657943. (See Appx. P29; Brown Decl. ¶4; Plaintiff’s
 14 **Exhibit L**).
 15
 16
 17

18 Thereafter, on October 22, 2015, the USPTO issued an Office Action,
 19 refusing to register Defendant’s registration based upon the likelihood of confusion
 20 with several of LFP’s registered HUSTLER marks (U.S. Reg. Nos. 2689852,
 21 4268341, & 4312312). Among other things, the Examining Attorney, citing 15
 22 U.S.C. §1052(d), stated that the USPTO would not register the applied-for mark
 23 on the grounds that it “so resembles a registered mark that it is likely a potential
 24 consumer would be confused, mistaken, or deceived as to the source of the goods
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and/or services of the applicant and registrant.” (See Appx. P30 – P31; Brown Decl. ¶¶ 6-7; Plaintiff’s **Exhibits M and N**).

Defendant responded to the likelihood of confusion rejection raising various arguments. However, on January 10, 2016, the USPTO issued a Final Office Action, finding the arguments raised by Defendant to be “unpersuasive.” Again, the USPTO reasserted its finding that applicant’s applied-for mark was likely to be confused with marks owned by Plaintiff. (See Appx. P32; Brown Decl. ¶¶ 6-7; Plaintiff’s **Exhibit O**).

b. Defendant’s Website and Sale of Infringing Apparel

In or about the fall of 2015, Defendant launched a newly-designed website located www.americanhustlerclothing.com that displayed and sold various “American Hustler” apparel items. Defendant claims to have sold approximately \$11,000 worth of t-shirts, but then ceased selling and distributing his clothing items after receiving a cease and desist letter from LFP in November 2015. (See Appx. P33 – P36; Brown Decl. ¶11; Ryoo Decl. ¶ 8; Plaintiff’s **Exhibits P, Q and R**).

3. Defendant’s “American Hustler” Mark Infringes the HUSTLER® Mark.

a. The HUSTLER® Registrations Provide Conclusive Evidence of Ownership, Validity, and the Exclusive Right to Use the Mark.

1 A plaintiff can establish that it has a valid, protectable trademark by showing
2 that it has a “federally registered mark in goods or services.” *Applied Info. Scis.*
3 *Corp.*, 511 F.3d at 969-70. Registration of a mark “shall be prima facie evidence
4 of the validity of the registered mark and of the registration of the mark, of the
5 registrant’s ownership of the mark, and of the registrant’s exclusive right to use the
6 registered mark in commerce on or in connection with the goods or services
7 specified in the certificate” 15 U.S.C. §1057(b) [Emphasis]; see also 15 U.S.C.
8 §1115(a). “Registration of a mark is prima facie evidence of the validity of the
9 mark, the registrant’s ownership of the mark, and the registrant’s exclusive right
10 to use the mark in connection with the goods specified in the registration.” *Pom*
11 *Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014). Here, among
12 other things, LFP’s HUSTLER® mark is registered for various apparel items and
13 retail services.
14

15 Moreover, many of these registered marks have been acknowledged as
16 incontestable under 15 U.S.C. § 1115(b). The effect of incontestable status under
17 the Lanham Act is that the registration goes beyond prima facie evidence to
18 become “conclusive evidence” of the ownership, validity, and exclusive right to
19 use the mark. See, 15 U.S.C. §1115(b). The registrations are also constructive
20 notice of the registrant’s claim of ownership of the mark under 15 U.S.C. § 1072.
21 Because the registrations provide conclusive evidence that LFP has a protectable
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ownership interest in the marks and the exclusive right to use the marks, LFP has satisfied the first element of its trademark infringement claim.

b. Defendant's Mark is Likely to Be Confused with Plaintiff's Marks

In this case, the Defendant merely adds the term "American" before Plaintiff's established trademark. "Obviously, the greater the similarity between the two marks at issue, the greater the likelihood of confusion." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000). Courts, in interpreting federal trademark law, have repeatedly held that "there is a great likelihood of confusion when the infringer uses the exact trademark' as the plaintiff." *S & R Corp. v. Jiffy Lube Intern., Inc.*, 968 F.2d 371, 375 (3d Cir. 1992). In these cases, "[the] likelihood of confusion is inevitable." *Opticians Ass'n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 195 (3d Cir. 1990).

"Cases where a defendant uses an identical mark on competitive goods hardly ever find their way into the appellate reports. Such cases are 'open and shut' and do not involve protracted litigation to determine liability for trademark infringement." *Id.* "[L]ess similarity between the marks will suffice when the goods are complementary, ... the products are sold to the same class of purchasers, ... or the goods are similar in use and function." *AMF Inc. v. Sleekcraft Boats*, 599

1 F.2d 341, 341 (9th Cir. 1979); *see, e.g., Perfumebay.com Inc. v. EBAY, Inc.*, 506
 2 F.3d 1165, 1174 (9th Cir. 2007) [“PerfumeBay” confusingly similar to “eBay”
 3 mark]; *Brookfield*, 174 F.3d at 1055 [“moviebuff.com” was essentially the same
 4 as “moviebuffonline.com” and likely to confuse the public].
 5

6 Here, Defendant has used and continues to operate a website using the
 7 entirety of Plaintiff’s HUSTLER® mark in connection with competitive goods and
 8 services. The marks are identical, save for Defendant’s addition of a
 9 geographically descriptive term – “American.” Further, on many of Defendant’s
 10 t-shirt designs, the HUSTLER mark is featured prominently, apart from the
 11 disclaimed and descriptive “American” term (See Appx. P44; Ryoo Decl. ¶12;
 12 **Exhibit V**).
 13
 14
 15

16 While Defendant has argued that his mark is not identical to Plaintiff’s
 17 HUSTLER® mark, his arguments failed before the USPTO. Among other things,
 18 LFP is a U.S. based company, founded by a famous American citizen, Larry Flynt,
 19 who is active in American politics and is often interviewed by the U.S. media. (See
 20 Flynt Decl. ¶¶ 9, 10 and 18). Further, the dominate and distinctive feature of
 21 Defendant’s mark is the term “HUSTLER.”
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25 In addition, Defendant Brett’s use of words like “*original brand*” and using
 26 dates from the 1970’s on his t-shirts further highlights the bad faith of Defendant
 27 in this instance. (See Appx. P37-P4; Ryoo Decl. ¶¶ 9-10; Plaintiff’s **Exhibits S**
 28

1 **and T).** After all, HUSTLER® magazine started in the 1970's, and Brett only
 2 recently started to sell clothing. Therefore, making it appear that his t-shirts were
 3 sold by a long-established company is deceptive, misleading, and further suggests
 4 that these t-shirts originate from LFP, or are otherwise connected to LFP and its
 5 owner, Larry Flynt.
 6

7
 8 Defendant has argued that adding "American" before an established mark
 9 somehow avoids consumer confusion.¹ However, Defendant's position would
 10 lead to ridiculous conclusions because he essentially suggests that "American
 11 Nike" for shoes would not infringe the NIKE® mark, and "American Levi's" for
 12 jeans would not infringe the LEVI'S® mark. Simply put, adding the term
 13 "American" before established trademarks does not mitigate against consumer
 14 confusion, especially when the mark holder is an American company.
 15 Accordingly, confusion is simply inevitable in this instance.
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19 There is no question as to the relatedness of the Plaintiff's goods and
 20 services and Defendants' goods and services, as they are identical. Further, the
 21 marketing channels used for Plaintiff's goods and services and Defendant's goods
 22 and services are identical and overlapping. Both Plaintiff and Defendant market
 23 their competing apparel items via websites, social media sites, and through word
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 28 ¹ Further, it is important to note that Defendant disclaimed the term "American" in
 his service mark application filed before the USPTO.

1 of mouth. The current overlapping nature of their competing web presence is
 2 enough to demonstrate a likelihood of confusion. *See, e.g., Brookfield*, 174 F.3d at
 3 1057 (“In addition to the relatedness of products, [the parties] both utilize the Web
 4 as a marketing and advertising facility, a factor that courts have consistently
 5 recognized as exacerbating the likelihood of confusion”).
 6

7
 8 When an alleged infringer knowingly adopts a mark similar to another's,
 9 courts will presume an intent to deceive the public.” *Official Airline Guides, Inc.*
 10 *v. Goss*, 6 F.3d 1385, 1394 (9th Cir. 1993). Further, because Plaintiff’s marks are
 11 registered, Defendant was at least on constructive notice that the mark was owned
 12 by another party prior to their adoption of the mark.
 13

14
 15 Given the conclusive evidence that LFP has a protectable ownership interest
 16 in the HUSTLER® marks, plus the fact that Defendant is merely adding the word
 17 “American” before “Hustler,” on identical and competing goods, summary
 18 judgment should be entered in favor of Plaintiff on its trademark infringement
 19 claim.
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22
 23 **B. Defendant’s Argument:**

24 **1. Defendant is the Owner of AMERICANHUSTLER**

25
 26 The defendant is the instructor for the worlds largest pool league, (American pool
 27 players association with over 250,000 members) coached many world champions,
 28

the Hong Kong national team, plays pool professionally, and is very well known around the world in the pool industry. In 2012 Mr Brett was in a car accident, unable to play pool, and couldn't fulfill his coaching duties. In December 2014, Lee (born in 1974) and his then girlfriend Reni Rose (born in 1971) decided to start a clothing line in the pool industry that sold quality clothes, (the industry is awash with cheap clothing) and American Hustler was born. Mr Brett invested all of the settlement (\$32,000) into the business. Hustler is a very commonly used word in the English dictionary. The famous 1961 movie "The hustler" being & 1986, "The color of money" starring Tom Cruise was the sequel to "The Hustler" are about a **pool hustler**. In 1915 WC Fields made a movie about pool hustlers, the English dictionary mentions a pool hustler, the word Hustler and the pool industry are synonymous. (See Appx. D4-D6,D7,D9-D10,D34,D41,D48 Exhibit's 3,19,23,26). The name American Hustler has a very unique meaning, the word American represents, the clothing is all American made, of the best quality you can buy. Hustler represents what a hustler means in the pool world. The star behind the brand name, represents Lee being a star in the pool industry. The star is red, the color of Lee's favorite team, Liverpool F.C. Lee Brett filed a service mark application with the United States Patent and Trademark Office ("USPTO") for "American Hustler" on June 10, 2015. In July Lee Brett and Reni Rose attended the BCA (billiard congress of America) national singles and team championships in Las Vegas, and then the APA team

1 championship nationals in Las Vegas, setting up a booth. (See **Exhibit 48**). These
 2 are special events for pool players. September 22nd 2015 American Hustler Serial
 3 Number 86657943 was approved for publication by the USPTO (See **Appx. D1 ;**
 4 **Exhibit 1**). October 22nd 2015 defendant received an office action to overcome,
 5 due to a letter of protest from the plaintiffs. On the 10th of January the USPTO
 6 issued an office action due to LINGERIE. We never even sold lingerie, nor
 7 intended too. (See **Appx. D36 ; Exhibit 21**). The examiner quoted that “The goods
 8 of the applicant and registrant are likely to travel through the same channels of trade
 9 and they are likely to be encountered by the same consumers who are likely to be
 10 confused as to the source of goods and services of the parties in question” The
 11 defendant is allowed to appeal to the examiner to re look at the application or appeal
 12 to the TTAB (See **Appx. D3 ; Exhibit 2**). Before the defendant could appeal, and
 13 remove LINGERIE, the plaintiffs filed the federal lawsuit, which takes precedence
 14 over the TTAB, this would stop the defendant from appealing to the TTAB, and thus
 15 removing LINGERIE. The defendant doesn't sell lingerie nor had any intention of
 16 selling lingerie. Under the sleekcraft 8 factors of likelihood of confusion the
 17 examiner failed to look at the channels of trade and the degree of care used by
 18 consumer's care when buying. **The 9th Circuit issues terse memorandum.** More
 19 recently, the Ninth Circuit issued a terse memorandum disposition that held:
 20 "Summary judgment is generally disfavored in trademark litigation, because the
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1 nature of trademark case analysis is fact intensive." CELS Enters., Inc. v. Rock &
 2 Roll Religion, Inc., 2012 WL 3157150 (9th Cir. Aug. 6, 2012). The 9th circuit takes
 3 each case on its merits and uses the 8 factors of likelihood of confusion using
 4 the Amf inc. v. Sleekcraft boats, 599 F.2d 341 (9th Cir. 1979) determining whether
 5 there is genuine issue of material fact as to the likelihood of confusion between the
 6 parties' respective marks. The cases that the plaintiff's have quoted need to be
 7 analyzed in more detail. There are completely different facts to this case. Pom
 8 Wonderful LLC v. Hubbard, 775 F.3d 1118, 1124 (9th Cir. 2014). According to court
 9 documents, no one else in the industry had used "pom" before that. Plaintiff's LFP
 10 claims exclusive rights. **HUSTLER STATE® US reg No 1934785 IS THE**
 11 **SENIOR USER NOT** (LFP's hustler) IC 025. US 022 039. which is now deemed
 12 incontestable under the Lanham Act. for clothing, registered November 14, 1995.
 13 FIRST USE: 19910901. **FIRST USE IN COMMERCE: 19910901 (See Appx.**
 14 **D14 ; Exhibit 6).** Hustler U.S. Reg. Nos. 2689852 – IC 025. US 022 039. FIRST
 15 USE: 19981203. FIRST USE IN COMMERCE: 19981203 Hustler Hollywood U.S.
 16 Reg. No 2318186 - retail store services relating to books and prerecorded video
 17 cassettes, **NOT clothing or Apparel.** FIRST USE IN COMMERCE: 19981203
 18 HustlerHollywood U.S. Reg. No.4312312 was registered on April 2, 2013 featuring
 19 apparel, hats. Hustlerstore U.S. Reg. No 4268341 was registered on January 1st 2013
 20 featuring apparel, lingerie, hats. **Conclusive evidence that the defendant has**
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proved that the plaintiff LFP doesn't have exclusive right to use the marks, LFP has not satisfied the first element of its trademark infringement claim.

"Obviously, the greater the similarity between the two marks at issue, the greater likelihood of confusion." In *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000). The logos were almost identical. (See Appx. D62 ; Exhibit 31).



Plaintiff's claim of Identical Marks? See for yourself.



HUSTLER

HUSTLER
HOLLYWOOD

The logo's of American Hustler and Hustler are clearly nowhere near identical.

(See Appx. D21 ; Exhibit 10) Conclusive evidence that the defendant has proved that the marks are not identical, LFP has not satisfied the second element of its trademark infringement claim. Similarity is best adjudged by

appearance, sound, and meaning. The defendant's mark is not the same, doesn't look the same, sound the same, the font is different. (See Appx. D21 ; Exhibit 10)

By quoting NIKE® and LEVI®, LFP are alleging the hustler marks are as famous

as NIKE® and LEVI®. The Plaintiff claims that the Defendant is merely adding the word “American” on identical and/or competing goods. This is not the full facts, the American hustler mark also has a huge red star behind the words American Hustler, (something the plaintiff forgets to mention). When considering the similarity of the marks they are clearly different marks in their entirety as to appearance, sound, connotation and commercial impression. **Strength or Weakness of the Plaintiff’s Mark.** See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992). “The strongest marks. Those which receive the maximum trademark protection (NIKE®,LEVI®) Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1141 (9th Cir. 2002). The weakest marks, entitled to no trademark protection, are “generic.” The plaintiffs mark is very weak, being that it is generic. Fair use is allowed for a generic word. (motion to dismiss) If the mark is not ruled to be generic, at best it is descriptive, giving it the lowest protection”² NIKE® and

² Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). In evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). The points of comparison for a word mark are appearance, sound, meaning, and commercial impression. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin MaisonFondee en 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005), citing In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Importantly is whether the marks in their entirety convey significantly different commercial impressions. In re Farm Fresh Catfish Co., 231 USPQ 495 (TTAB 1986) (CATFISH BOBBERS (with "CATFISH" disclaimed) for fish not likely to be confused with BOBBER for restaurant services); In re Shawnee Milling Co., 225

LEVi® are clearly fanciful, thus the strongest, hustler is a generic word.)LFP is fighting to stop it becoming generic) Ebay was regarded as a strong mark, hustler is clearly not. Descriptive marks **must show a secondary meaning** or have become distinctive of the goods in commerce.) (Goods being clothing.)Whether a mark has acquired secondary meaning is a “factual determination, proof of which entails vigorous evidentiary requirements,” Marshall, 2012 WL 1079550, and the burden of proof to establish secondary meaning rests at all times with the plaintiff.

Here, Plaintiff has produced no evidence, or even argument, to show that its Asserted Mark has acquired secondary meaning. The Ninth Circuit Court of Appeals held that one factor militating against a finding of acquired distinctiveness was the **"lack of exclusivity Accordingly"** Plaintiff's Asserted Mark lacks secondary meaning and is a weak mark. Third-party registrations may be relevant to show that the mark or a portion of the mark is descriptive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. See, e.g., AMF Inc. v.American Leisure Products, Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269-70(C.C.P.A. 1973); Plus Products v. Star-Kist Foods, Inc., 220 USPQ 541, 544(TTAB1983). Properly used in this limited manner, third-

USPQ 747 (TTAB 1985) (GOLDEN CRUST for flour not likely to be confused with ADOLPH'S GOLD'N CRUST and design for coating and seasoning for food items); In re S.D. Fabrics, Inc., 223 USPQ 54 (TTAB 1984 (DESIGNERS/FABRIC for retail fabric store services not likely to be confused with DAN RIVER DESIGNER FABRICS.

party registrations are similar to dictionaries showing how language is generally used See, e.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 675, 223 USPQ 1281, 1285-86 (Fed. Cir. 1984); Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915. Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions. See, e.g., In re Sears, Roebuck and Co., 2 USPQ2d 1312 (TTAB 1987) (CROSS-OVER for bras held not likely to be confused with CROSSOVER for ladies' sportswear, ; In re British Bulldog, Ltd., 224 USPQ 854 (TTAB 1984) (PLAYERS for men's underwear. In re Sydel Lingerie Co., Inc., 197 USPQ 629 (TTAB 1977) (BOTTOMS UP for ladies' and children's underwear held not likely to be confused with BOTTOMS UP for men's clothing. If the common element of two marks is "weak" in that it is generic, descriptive of the named goods or services, consumers typically will be able to avoid confusion unless the overall combinations have other commonality.³

Comparing NIKE® to Hustler. This is a completely misguided statement, to compare hustler with NIKE® or LEVI® without proof, **strict proof thereof is demanded.** That would be like comparing WALMART® to SHOP N SAVE. NIKE® is famous and protected under the Lanham act for dilution. You will notice

³ See. In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986) (BED & BREAKFAST REGISTRY) v (BED & BREAKFAST INTERNATIONAL) The U.S. Shoe Corp. v. Chapman, 229 USPQ 74 (TTAB 1985) (COBBLER'S OUTLET for shoes held not likely to be confused with CALIFORNIA COBBLERS (stylized) for shoes).

the plaintiff's have not made a summary judgment for their outrageous dilution claims. **LFP's Evan Roosevelt's admits people under 30 aren't familiar with HUSTLER (See Appx. D94; Exhibit's (33 and 39).** It's Evan Roosevelt's job to change that. The 34-year-old has a background in both politics and tech consulting, and is currently attempting to revive the flagging **Hustler brand** by mirroring successes in the worlds of music and traditional publishing. He recently helped broker a licensing deal with the avant-streetwear brand Hood By Air, which he views as the first step in introducing Hustler to a millennial audience. **"The marketplace of adult entertainment** is changing, and we want to change with it," he tells me. **"I think anyone under 30 or so isn't really familiar with Hustler"** NIKE® is the most powerful of trademarks on the scale, it is fanciful, NIKE® is also famous, you wouldn't see NIKE® lawnmowers, pool tables or NIKE® boat trailers. But you do have the registered marks for HUSTLER® US Reg No 1431031 Boat trailers, HUSTLER® US Reg No 1825275 pool tables, HUSTLER® US Reg No 1985194 Lawn mowers. This is because HUSTLER is not famous, they are also not famous for the likelihood of confusion. LFP's hustler mark, is not even well known. Without any evidence to back these claims, **strict proof thereof is demanded.** Hustler is a commonly used word, hence all the marks registered. A significant member of their own company admitting they aren't even well known. The plaintiff is not allowed to own the word hustler, The

HUSTLER® trademark and service mark has been used by many others for over 30 years., there are over 381 trademarks on the uspto database, registered or applied for with the word hustler, this also clearly shows that the word hustler is generic, and shouldn't of been approved to be registered. (See Appx. D11-D13,D45,D63;Exhibit's (3,4,5,6,8,14,15,16,17,18,25,32,39). There are many other marks with the name hustler in the same category selling clothing. 3 The actual facts need to be taken on a case-by-case basis. In connection with a chain of retail stores, the plaintiffs are not pointing the actual facts, that **they are a sex shop in a completely different industry** with no likelihood of confusion. The defendant sells his apparel at ⁴pool and billiard shows, the plaintiffs sells their sexually

⁴ Since everyone deserves the right to accurately identify the type of goods or services it sells, to allow a single company to claim trademark rights to a generic term would impoverish the language and unfairly hamper competition. The common law's tolerance of a certain degree of confusion on the part of consumers followed from the very fact that in cases like this one, an originally descriptive term was selected to be used as a mark, not to mention the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first. The Lanham Act adopts a similar leniency, there being no indication that the statute was meant to deprive commercial speakers of the ordinary utility of descriptive words. "If any confusion results, that is a risk the plaintiff accepted when it decided to identify its product with a mark that uses a well known descriptive phrase." *Cosmetically Sealed Industries, Inc. v. Chesebrough-Pond's USA Co.*, 125 F.3d at 30. See also *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 201 (1985) (noting safeguards in Lanham Act to prevent commercial monopolization of language); *Car-Freshner Corp. v. S.C. Johnson & Son, Inc.*, 70 F.3d 267, 269 (2d Cir. 1995) (noting importance of "protect[ing] the right of society at large to use words or images in their primary descriptive sense").

1 graphic apparel (**See Appx. D51-D57; Exhibit 29**) out of their own sex shops (**See**
 2 **Appx. D37 ; Exhibit 22**) the plaintiffs website states that they are a sex shop (**See**
 3 **Appx. D38 ; Exhibit 22**) “Hustler Hollywood stores exist because of our mission
 4 to provide people **with a place to be curious and shop without that “seedy”**
 5 **feeling that many sex shops give off”.** Even LFP's Evan Roosevelt clarifies
 6 **they are in the adult entertainment market.** (**See Appx. D94; Exhibit's (33 and**
 7 **39).** Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 954 F.2d
 8 713 (Fed. Cir. 1992). Sales to the same customers. But no conflict. Defendant is in
 9 a completely different industry, the meaning of a hustler is associated with the pool
 10 industry before the plaintiffs mark was used. Many other trademarks have been co-
 11 existing peacefully in the marketplace with no likelihood of confusion. LFP, IP,
 12 LLC hustler mark is not distinctive, the word hustler is a generic word. Interstellar
 13 Starship Services, Ltd. v. Epix, Inc., 304 F.3d 936, 944 (9th Cir. 2002) (citing
 14 Hasbro Inc. v. Clue Computing, Inc., 232 F.3d 1, 2 (1st Cir. 2000) (noting very
 15 little similarity between Hasbro’s board game CLUE and the products and services
 16 of Clue Computing) **the Ninth Circuit noted that Epix has no exclusive claim to**
 17 **its trademark.** Indeed, the record reflects that at least eight companies have
 18 registered the EPIX mark or a close variation with the PTO.” There are 22
 19 registered hustler or similar hustler marks, of the 22 registered marks 6 sell
 20 clothing, 5 of which where registered before Hustler Hollywood was for clothing.
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1 LFP also claims exclusive right to use the mark in connection with the goods
 2 specified, but fails to mention these other marks where registered before them, and
 3 have been peacefully co-existing without any likelihood of confusion. LFP
 4 recently agreed to let IS FOR HUSTLERS® mark to be registered for clothing
 5 after they appealed to the TTAB. IS FOR HUSTLERS® mark states the following,
 6
 7 **“excluding clothing directly or indirectly linked to adult entertainment”**
 8
 9 HUSTLE® US registration number 4723612 was registered on April 21, 2015 for
 10 graphic t-shirts. There are many registered hustler trademarks, more clear
 11 evidence, that they are not the source of goods by the consuming public of the
 12 United States, clear factual evidence that there is no likelihood of confusion. Some
 13 of these other Hustler marks have peacefully coexisted without any confusion for
 14 over 30 years. **(See Appx. D14-D18,D45 and D45 ; Exhibit 6)** HUSTLER® US
 15 Reg No 1347192 reg (1985) HUSTLER® US Reg No 1431031 (1987)
 16 HUSTLER® US Reg No 1825275 (pool tables) (1994) HUSTLER® US Reg No
 17 1985194 (1996) HUSTLER® US Reg No 2423910 (2001) HUSTLER® US Reg
 18 No 3922785 (2011) ADIDAS® NIKE® AMAZON® SPREADSHIRT® FASO®
 19 ETSY® and CAFEPRESS® among many others, have all sold clothing with the
 20 generic word hustler on it this clearly shows how popular the word Hustler is, **(See**
 21 **Appx. D28-D33,D44,D90 and D91; Exhibit's 16,17, and 18)** The fact that there
 22 are many laches, a clear lack of policing of the hustler mark. If there was any
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1 distinction, it has been lost. **LFP's Evan Roosevelt's job is to, “revive the**
 2 **flagging brand” (See Appx. D94; Exhibit's (33 and 39). What is the difference**
 3 **with POLO and HUSTLER?** The words Polo and Hustler? Both are common
 4 words in the English dictionary. 79 registered marks exist for the word polo for
 5 clothing.(See Appx. D19 ; Exhibit 7). How is HUSTLER any different to the
 6 word Polo? Here are just a few of the POLO marks for clothing.⁵ **Evidence of**
 7 **Actual Confusion** - There isn't any, plaintiff's admit to having done **no surveys.**
 8 (See Appx. D27 ; Exhibit's(13). Plaintiffs false accusations of bad faith, there are
 9 many issues of disputed facts. The defendant is in the pool industry, (See Appx.
 10 **D41 ; Exhibit 23)** the word hustler has been associated with the pool industry
 11 before LFP was formed, Lee Brett is well known in the pool industry, Lee Brett
 12 was born in 1974,In the “respect the game design” the plaintiffs claim bad faith
 13 intent using 19745 . If you look at these designs you will see the words “**respect**
 14 **the game”**, “**pool**”, “**focus**”, “**zone**, which are used in pool“ included with the
 15 Letters AH”, which stand for American Hustler, the numbers “19” “74” are either
 16 side of an eagle, they represent the year the defendant was born. Reni Rose was
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 25 ⁵ POLO® ALL POLO® VICUNA POLO® PRIMA POLO® PERFECT POLO®
 26 TEXAS POLO® ARGENTINO POLO® POLO U.S.A® US POLO ASSN® HV
 27 POLO® POLO NATION® U.S.A WATER POLO® JON POLO® POLO GOLF®
 28 POLO JEANS® POLO SPORT® POLO PRLC® MARCO POLO® MARC O
 POLO® MARCO NOT POLO® POLO STAR® Other variations include,
 California, Hawaii, Houston, Malibu, St Moritz, New York, Beverly Hills.

born in 1971, the words original are generic words used by many clothing brands. The defendant's website states who the owner is, that they clearly sell pool clothing.⁶ **"Lee Brett the founder of American Hustler.** We decided to start American Hustler so **players can wear stylish apparel, in and out, of the pool hall.** There are many pool related terms on the designs, which the plaintiff fails to mention. The website includes the following **"Hustling** never looked so good" **"Pool clothing** that jumps off the rack" **"Pool apparel** from a different angle" (See Appx. **D4-D6,D34, D35,D47,D48,D49- D50,D65,D101; Exhibit 3,11,19,20,26,27,28,34 and 44**) The plaintiffs Social media has sex items and semi-naked images all over it (See Appx. **D61 ; Exhibit 22**) When consumers are buying the defendant's apparel **they are pool players**, who are in a niche marketplace, pool events have been held in Las Vegas for over 40 years (See Appx. **D88; Exhibit 36**) The consumers who buy from the plaintiffs are **entering a sex shop**, or shopping online at the **hustler Hollywood sex store.** The consumer clearly knows who they are purchasing the goods from, they are sophisticated enough to know, there is no comparison, there is no likelihood of confusion.

⁶ The defendant was born in 1974, the defendants ex girlfriend Reni Rose was born in 1971, the defendant cleared this up with LFP's lawyers Adi Schnapps and Mark Hoffman during a meeting in LA. The reason why some designs have 1974 or 1971 on them. LFP admits to not owning 1974. They want to steal and use American Hustler as their own, told me to my face many times, that they will steal this off of me. The first step in introducing Hustler to a millennial audience.

1 Defendant only knew of LFP after they filed a letter of protest. These are ridiculous
 2 accusations being made by the plaintiffs, once again the plaintiff's are twisting the
 3 real facts of the case and making outrageous false accusations, the defendant did
 4 not engage in malicious, bad faith, fraudulent, deliberate or willful conduct.
 5

6 **Marketing Channels and Degree of Care Used by Consumers** "The case is

7 Hasbro Inc. v. Asus Computer International LLC et al., case number 2:11-cv-

8 10437, (C.D. Cal. Mar. 23, 2012). The U.S. District Court for the Central District

9 of California. Points to the fact that a Google search for "optimus prime tablet"

10 picks up Asus's "Transformer Prime" tablet. Google is the world's largest search

11 engine. Reasonable consumers understand that when executing a key word search,

12 **Search for pool clothing (See Appx. D99 ; Exhibit 42)** the results they are

13 presented with originate from thousands of sources, if not more. See Network

14 Automation, 638 F.3d at 1152 ("the default degree of consumer care is becoming

15 more heightened as the novelty of the Internet evaporates and online commerce

16 becomes commonplace") (citing Toyota Motor Sales v. Tabari, 610 F.3d 1171 (9th

17 Cir. 2010)) Consumers who use the internet for shopping are generally quite

18 sophisticated about such matters, and not be confused at all. A plaintiff asserting

19 initial interest confusion must still "demonstrate likely confusion, not mere

20 diversion." Network Automation, Inc. v. Advanced Systems Concepts, Inc., 638

21 F.3d 1137, 1149 (9th Cir. 2011). See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341,

348- 49 (9th Cir. 1979). The assessment of likelihood of confusion is predominately factual in nature. E&J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290 (9th Cir. 1992). Consumers are not confused by the source of the defendant's goods being from the pool industry. The products differ markedly in design and function. (See Appx. D58 ; Exhibit's 30, 34, 35 and 37). plaintiff's (See Appx. D51- D57; Exhibit 29). Target very different consumers. AMERICAN HUSTLER clothing, consumers searching for the cited marks products (See Appx. D99 ; Exhibit 20) would be different from those viewing Applicant's products. See Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d 1388, 1392 (Fed. Cir. 1992), "sophisticated consumers may be expected to exercise greater care." Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 212 USPQ 246, 252 (1st Cir. 1981); and "There is always less likelihood of confusion where goods are expensive and purchased after careful consideration." Astra Pharmaceuticals Prods., Inc. v. Beckman Instruments, Inc., 220 USPQ 786, 790 (1st Cir. 1993). In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). commercial impression between HUSTLER HOLLYWOOD and AMERICAN HUSTLER and huge red star design, is also distinguishable. (See Appx. D20 ; Exhibit 9). See In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 1566 (Fed. Cir. 1984) and Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974). When determining

1 likelihood of confusion, fame is measured with regard to "the class of customers
 2 and potential customers of a product or service, and not the general public." Palm
 3 Bay Imports, at 396 F.3d 1375, 73 USPQ2d 1695. **Not** famous, their class of
 4 customers, are those interested in sexual related products. While the applicants
 5 class of customers are in the pool industry. Likelihood of expansion of product
 6 lines, the plaintiffs haven't entered the same industry as the defendant's, and with
 7 this lawsuit being brought, they also have a bad name, and are not welcome in the
 8 niche and closed market that is the pool industry. With the fame in the industry of
 9 the defendant, the pool market is well aware of the plaintiffs frivolous lawsuit.
 10 Recent clothing lawsuit no likelihood of confusion Icebreaker Ltd. v. Gilmar
 11 S.p.A., November 26, 2012, No. 3:11-CV-00309-BR. 911 F. Supp.2d 1099 (2012)
 12 no likelihood of confusion was found (**See Appx. D 100; Exhibit 43.**) Regarding
 13 Mr Flynt being an American citizen, and in politics. During the proceedings in
 14 Keeton v. Hustler **"Fuck this court!"** and **called the justices "nothing but eight**
 15 **assholes and a token cunt"** (referring to Justice Sandra Day O'Connor). Chief
 16 Justice Warren E. Burger had him arrested for contempt of court. **Flynt wore an**
 17 **American flag as a diaper and was jailed for six months for desecration of the**
 18 **flag.** Paid his \$10,000 in pennies. Defendant asks the judge to lift the injunction,
 19 plaintiff's told defendant they had. **Given the conclusive evidence that there is**
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1 no likelihood of confusion, Summary judgment should be entered in favor of
 2 the defendant on the plaintiff's trademark infringement claim.

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7 **II. False Designation of Origin Claim**

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9 **A. Plaintiff's Argument: Plaintiff Should Be Granted Summary**
 10 **Judgment on its Third Cause of Action for False Designation of**
 11 **Origin (15 U.S.C. § 1125(a)).**

12 Plaintiff is also likely to succeed on its false designation of origin claim
 13 under 15 U.S.C. § 1125(a), as a false designation of origin claim turns on the
 14 likelihood of confusion as well. In order to prevail on a false designation of origin
 15 claim, a plaintiff must show that the defendant has used in commerce a word, term,
 16 name, symbol, and/or device which "is likely to cause confusion, or to cause
 17 mistake, or to deceive as to the affiliation, connection or association of such person
 18 with another person, or as to the origin, sponsorship, or approval of his or her
 19 goods, services, or commercial activities by another person." 15 U.S.C. §
 20 1125(a)(1)(A).
 21
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24 In this case, Defendant has and is using the infringing "American Hustler"
 25 mark on his website and is likely to cause confusion or mistake regarding the
 26 connection between Plaintiff and Defendant, and/or the origin, sponsorship, or
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 28

1 approval of Defendant's products. By Defendant's use of an almost identical mark,
 2 save for the addition of the term "American," consumers are likely to assume either
 3 that Plaintiff has authorized Defendant to use the registered marks, or that Plaintiff
 4 is actually the source of Defendant's products.
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 7 For all of the reasons set forth above, summary judgment should be entered
 8 in favor of Plaintiff on its 15 U.S.C. § 1125(a) claim.
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 12 **B. Defendant's Argument:**

13 Defendant Should Be Granted Summary Judgment on the plaintiff's Third Cause
 14 of Action for False Designation of Origin Defendant will also succeed on the false
 15 designation of origin, as a false designation of origin claim turns on the likelihood
 16 of confusion as well.
 17

18
 19 The defendant has clearly shown that there is no likelihood of confusion under the
 20 8 factors. See AMP, Tnr., v. Sleekcraft Boats. 599 F.2d 341, 348-49 (9th Cir.
 21 1976).⁷ Summary judgment should be ruled in favor of the defendant. There is
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24 ⁷ **Proximity or Relatedness of Goods** - Pool industry to the sex industry.
 25 **Similarity of the Marks** - Appearance, sound and commercial impression are
 26 completely different. **Actual Confusion** - LFP admits to no survey evidence.
 27 **Marketing Channels** - Completely different markets, LFP has their own sex
 28 shops, and online sex shop. Defendant sells at pool shows and online website
 which states what they sell pool apparel. **Purchaser Care** - Consumers buying
 plaintiff's sexual clothing would be in their sex store or entering their online sex

1 clearly no likelihood of confusion and this case should be thrown out of court in
 2 favor of the defendant. For all of the reasons set forth above, summary judgment
 3 should be entered in favor of the defendant.
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5 6 7 8 **III. Anti-Cybersquatting Consumer Protection Action Claim**

9 **A. Plaintiff's Argument: Plaintiff Should Be Granted Summary** 10 **Judgment on its ACPA Claim (15 U.S.C. § 1125 (d)(1)(A)).**

11
 12 In 1999, Congress passed the Anti-Cybersquatting Consumer Protection Act
 13 ("ACPA"). The ACPA "establishes civil liability for 'cyberpiracy' when a plaintiff
 14 proves that (1) the defendant registered, trafficked in, or used a domain name; (2)
 15 the domain name is identical or confusingly similar to a protected mark owned by
 16 the plaintiff; and (3) the defendant acted 'with bad faith intent to profit from that
 17 mark.'" *DSPT Intern., Inc. V. Nahum*, 624 F.3d 1213, 1218-19 (9th Cir.2010). As
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 22 shop. Consumers buying the defendant's pool apparel, would be at a pool show or
 23 searching for pool clothing, the consumer has a high degree of care when making
 24 purchasing decisions. **Intent** - Defendant's website clearly states the owners name,
 25 that they sell pool clothing, defendant was born in 1974, LFP admits to not owning
 26 1974, defendant is in the pool industry, the word hustler is synonymous with the
 27 pool industry. There is no bad faith. Likelihood of **Expansion** - Plaintiff's have
 28 never entered the pool industry nor have they said they would. Defendant won't be
 entering the sex industry. **Mark Strength** - Plaintiff's mark is generic and very
 weak, there are a large number of third parties with the word hustler and for
 clothing.

1 set forth above, Defendant used and continues to use a website that incorporates
 2 the HUSTLER® mark. (See Appx. P33; **Exhibit P**).

3
 4 “[R]egistration of a domain name for a Web site does not trump long-
 5 established principles of trademark law. When a firm uses a competitor's trademark
 6 in the domain name of its web site, users are likely to be confused as to its source
 7 or sponsorship. Similarly, using a competitor s trademark in the metatags of such
 8 web site is likely to cause what we have described as initial interest confusion.
 9 These forms of confusion are exactly what the trademark laws are designed to
 10 prevent.” *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*,
 11 174 F.3d 1036, 1066 (9th Cir. 1999).
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 16 The Ninth Circuit thoroughly analyzed the dangers of consumer confusion in a
 17 similar Internet context in *Brookfield. Brookfield*, 174 F.3d at 1057:
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19 “Given the virtual identity of moviebuff.com' and ‘MovieBuff,’ the relatedness
 20 of the products and services accompanied by those marks, and the companies'
 21 simultaneous use of the Web as a marketing and advertising tool, many forms
 22 of consumer confusion are likely to result. People surfing the Web for
 23 information on ‘MovieBuff’ may confuse ‘MovieBuf’ with the searchable
 24 entertainment database at ‘moviebuff.com’ and simply assume that they have
 25 reached Brookfield's web site. In the Internet context, in particular, entering a
 26 web site takes little effort-usually one click from a linked site or a search engine
 27 list; thus, Web surfers are more likely to be confused as to the ownership of a
 28 web site than traditional patrons of a brick-and-mortar store would be of a
 store's ownership. Alternatively, they may incorrectly believe that West Coast
 licensed ‘MovieBuff’ from Brookfield, or that Brookfield otherwise sponsored

1 West Coast's database. Other consumers may simply believe that West Coast
2 bought out Brookfield or that they are related companies.”

3
4 Plaintiff's affiliate, LFP Internet Group, LLC, owns thousands of domain
5 names that incorporate the HUSTLER mark, including but not limited to
6 HUSTLER.com; HUSTLERHOLLYWOOD.com; HUSTLERSTORE.com;
7 HUSTLERAPPAREL.com; HUSTLERLINGERIE.com;
8 HUSTLERCLOTHING.com; and HUSTLERLIVE.com, among many others.
9
10 (See Appx. 12; Ryoo Decl. ¶ 3; Plaintiff's **Exhibit D**).
11
12

13 Plaintiff contends that Defendant registered and used the domain name, in bad
14 faith, and in an effort to ride the coat tails of LFP and its established HUSTLER®
15 marks. Incorporating the generic or descriptive words “American” and
16 “clothing” do not distinguish Defendant's domain name from the various LFP
17 domain names and websites. A consumer searching for “hustler clothing” or
18 “hustler American” could easily believe that Defendant's website is operated by,
19 or is affiliated with, the long established HUSTLER® brand owned by Plaintiff.
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21 Accordingly, for all intents and purposes, the distinctive component of
22 Defendant's domain name – “Hustler” – is identical to LFP's established brand.
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1 Given the above, summary judgment should be entered in favor of Plaintiff
 2 on its ACPA claim.

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 7 **B. Defendant's Argument:**

8 Defendant Should Be Granted Summary Judgment on the plaintiff's ACPA Claim.

9 LFP claims that the defendant deliberately, intentionally, and willfully profited off
 10 the plaintiff's fame, accusing the defendant of cybersquatting. The defendant did
 11 not engage in malicious, bad faith, fraudulent, deliberate or willful conduct, the
 12 defendant acted in good faith, all the facts clearly show this. **(See Appx. D4-D6**
 13 **;D9,D10,D34,D35,D41,D48,D49 and D93; Exhibit 3,19,20,22,23,26,27, and 28)**

14 The plaintiff's continue to make outrageous false accusations of bad faith and
 15 intent. The defendant did not engage in malicious, bad faith, fraudulent, deliberate
 16 or willful conduct, the defendant only knew of LFP after they filed a letter of
 17 protest. The defendant acted in good faith, all the facts clearly show this. The
 18 following web addresses, all are related to sex, and some are harmful to your
 19 computer. **(See Appx. D99 ; Exhibit 20)** Given all of facts in the case, there is no
 20 likelihood of confusion, the defendant did not engage in malicious, bad faith,
 21 fraudulent, deliberate or willful conduct, the defendant acted in good faith and all
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1 the facts clearly show this, summary judgment should be entered in favor of the
2 defendant.

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4 **IV. Defendant's Motion: LFP's hustler marks are NOT famous and**
5 **widely recognized by the general consuming public of the United**
6 **States**

7 **A. Defendant's Argument:**

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9 Defendant Should Be Granted Summary Judgment on its claim that LFP's
10 hustler marks are NOT famous and widely recognized by the general consuming
11 public of the United States. LFP claims the hustler marks are famous (**See Appx.**
12 **D23-D24 ; Exhibit 12**).and widely recognized by the general consuming public of
13 the United States, (throughout their complaint filed on 01/08/16) LFP's hustler mark
14 is NOT famous or well known with the general consuming public of the United
15 States. **I ask the judge any references to fame should be stricken**, these are
16 outrageous claims made by the plaintiffs, **strict proof thereof is demanded**. This
17 includes the following pages and references from the lawsuit, filed by the plaintiffs
18 LFP, IP, LLC, who claim the following. Page 2, Nature of Action #1. **“The famous**
19 **Hustler marks”**. **Page 12, #12.** **“The Hustler marks have become famous and**
20 **the public has come to know”** **Page 14, #21.** **“Fame associated with the Hustler**
21 **marks”** **COUNT I –** Infringement of registered trademark. **Page 15, #25.** **“Upon**
22 **information and belief. “the goodwill associated by the public”** **COUNTII –**
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Federal unfair competition designation of origin. Page 16, #30. **“LFP's Hustler marks are widely recognized by the general consuming public of the United States as a designation of the source”** Page 16, #31. To trade off the fame and notoriety” Page 16 #32. **“Will continue to deprive, plaintiff of the ability to control the consumer perception”** Page 16/17 #33. **“Will result in deception and confusion of the public”** **“The plaintiffs exclusive rights to exploit said famous Hustler marks”** Page 17, #35. **“Causing plaintiff irreparable damage and injury”** Defendant demands Strict proof hereof is demanded to the damage and injury. Count III – Trademark dilution The plaintiffs claim fame through this section, this should be struck out. COUNT IV – Violation of the anticybersquatting consumer protection act. Page 19, #46. **“Dilutive of LFP's marks”** Page 19, #47. Plaintiff LFP has **sustained irreparable harm** and will continue to **sustain irreparable harm**” Strict proof hereof is demanded. LFP's Evan Roosevelt's admits **people under 30 aren't familiar** with HUSTLER “I think anyone under 30 or so **isn't really familiar** with Hustler as much as they could be.” (See Appx. D94; Exhibit's (33 and 39). To state a claim for trademark dilution, a plaintiff in the Ninth Circuit must allege the defendant’s use of the mark is likely to cause dilution by blurring or tarnishment. Jada Toys, Inc. v. Mattel, Inc., 518 F.3d 628, 634 (9th Cir. 2007). For the first element, a mark must be “widely recognized by the general consuming public of the United States as a designation of source of

the goods or services of the mark's owner."15 U.S.C. § 1125(c)(2). In 2006, Congress revised the statute to specifically exclude dilution protection for marks whose fame extends only to niche markets. This restricts dilution claims to "those few truly famous marks like Budweiser beer, Walmart, Coca Cola, Nike and the like." Bd. of Regents, Univ. of Tex. Sys. ex. rel. Univ. of Tex. at Austin v. KST Elec., Ltd., 550 F. Supp. 2d 657, 679 (W.D. Tex. 2008). Showing that a mark is famous is no easy feat. Nissan Motor Co., 378 F.3d 1002, 1011 (9th Cir. 2004). And courts are clear that this is a "rigorous standard" that is difficult to prove. ArcSoft, Inc. v. CyberLink Corp., 153 F. Supp. 3d 1057, 1065 (N.D. Cal. Dec. 28, 15). Several courts have recently dismissed dilution claims at the pleading stage for failing to allege a plausible claim that the mark was famous. ArcSoft, Inc. v. CyberLink Corp., 153 F. Supp. 3d 1057 (N.D. Cal. Dec. 28, 15). Pinterest, Inc. v. Pintrips, Inc., No. 13-cv-04608-HSG, 2015 WL 6167967, at *21 (N.D. Cal. Oct. 21, 2015). In another recent example, the court dismissed a trademark dilution claim against a historic fraternity. See Theta Chi Fraternity, Inc. v. Leland Stanford Junior University, Case No. 16-cv-01336-RMW, 2016 WL 4524305 (N.D. Cal. Aug. 30, 2016). **Evidence against hustlers claims of fame. (See Appx. D14-D18,D28- D33 and D45 ; Exhibit 6,16,17 and 18).** A plaintiff **alleging fame** must establish that its mark is "widely recognized by the general consuming public of the United States." 15

1 U.S.C. § 1125(c) (2). The Federal Circuit’s recent decision in Coach Services, Inc.
 2 v. Triumph Learning LLC, 668 F.3d 1356 (Fed. Cir. 2012) (“Fed. Cir. Decision”)
 3

4 **For all of the reasons set above summary judgment should be entered in favor**
 5 **of the defendant, that LFP's hustler marks are NOT famous.**

6 **B. Plaintiff’s Response:**
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8 During the meet and confer process, Plaintiff agreed to dismiss its dilution
 9 claim in this action. Accordingly, Plaintiff’s counsel prepared a Stipulation for
 10 Dismissal of the Dilution Claim and sent it to Defendant for execution (See Brown
 11 Decl. ¶ 12; **Exhibit Z**). Several days later, after transmitting the Stipulation,
 12 Defendant refused to sign the stipulation and stated that he was planning to bring
 13 a motion based on the “fame” of the HUSTLER® clothing mark.
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15 Plaintiff has not pursued this claim, and requests that the Court dismiss this
 16 claim from this action. Accordingly, Defendant’s arguments above should be
 17 deemed moot, given that Plaintiff agreed to dismiss the dilution claim many
 18 months ago.
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 23 **V. Defendant’s Motion: Plaintiff's hustler marks are NOT well-known**
 24 **by the general consuming public of the United States**
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26 **A. Defendant's Argument:**
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1 Defendant Should Be Granted Summary Judgment on its claim that the hustler
 2 marks are not well-known by the general consuming public of the United States.
 3 Given the conclusive evidence that LFP's hustler marks are not famous. Defendant
 4 is also likely to succeed that the hustler marks are not well-known by the general
 5 consuming public of the United States. Summary judgment should be entered in
 6 favor of the defendant.
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9 The hustler marks are not even well-known, never mind famous. **LFP's Evan**
 10 **Roosevelt even admits that people under 30 aren't familiar with HUSTLER**
 11 **(See Appx. D94; Exhibit's (33 and 39). "It's Evan Roosevelt's job to revive the**
 12 **flagging Hustler" "I think anyone under 30 isn't really familiar with Hustler"**
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15 The TDRA applies only to a mark "widely recognized by the general consuming
 16 public of the United States as a designation of source of the goods or services of the
 17 mark's owner." The TDRA strengthens incentives for mark-owners to ensure their
 18 logos and brand names are well recognized not only among adult consumers, **but**
 19 **also among children.** In this case the plaintiff's hustler marks are NOT well-known
 20 by the general consuming public of the United States. Jada Toys, Inc. v. Mattel, Inc.,
 21 518 F.3d 628, 634 (9th Cir. 2007). A mark must be "widely recognized by the
 22 general consuming public of the United States as a designation of source of the
 23 goods or services of the mark's owner." 15 U.S.C. § 1125(c) (2). In 2006, Congress
 24 revised the statute to specifically **exclude dilution protection for marks whose**
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1 **fame extends only to niche markets.** Bd. of Regents, Univ. of Tex. Sys. ex. rel.
 2 Univ. of Tex. at Austin v. KST Elec., Ltd., 550 F. Supp. 2d 657, 679 (W.D. Tex.
 3 2008). Section 1125(c) A plaintiff must demonstrate that a mark is a “household
 4 name.” Nissan Motor Co., 378 F.3d 1002, 1011 (9th Cir. 2004). And courts are clear
 5 that this is a “rigorous standard” that is difficult to prove. ArcSoft, Inc. v. CyberLink
 6 Corp., 153 F. Supp. 3d 1057, 1065 (N.D. Cal. Dec. 28, 15).

9 **For all of the reasons set above summary judgment should be entered in**
 10 **favor of the defendant, that LFP's hustler marks are NOT well-known by**
 11 **the general consuming public of the United States.**

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15 **B. Plaintiff's Response:**

16 In this instance, Defendant brings a motion seeking to establish an opinion or a
 17 disputed fact. Plaintiff disputes Defendant's position, as there is a long history
 18 and many facts that support Plaintiff's contention the HUSTLER® is a well-known
 19 mark. The businesses operated under the HUSTLER® mark are found throughout
 20 the United States, and the mark has been used by Plaintiff (and its predecessors-in-
 21 interest) for many decades. Please see Joint Appx. P1 – P26; the Flynt Decl.; the
 22 Ryoo Decl. and the many trademark registrations owned by Plaintiff (Plaintiff's
 23 **Exhibits A-C; E-G; J).**

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4 **VI. Defendant's motion to dismiss, hustler is a generic word.**

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6 **A. Defendant's Argument: Defendant Should Be Granted Summary**

7 **Judgment on its claim that HUSTLER is a generic word.**

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9 This motion is made on the grounds that the term “Hustler” is not protectable, nor
10 does Plaintiff own the generic term and therefore Plaintiff cannot state a claim for
11 trademark infringement, false designation of origin, trademark dilution and
12 Violation of anticybersquatting. Frustrated by its lack of policing and laches
13 knowing that it cannot assert trademark rights for the term “hustler” Hence the
14 other 22 registered trademarks called hustler or similar. There are over 381
15 trademarks on the uspto database, registered or applied for with the word hustler.,
16 (See Appx. D11-D13, D63,D96-D97 ; Exhibit's (3,4,5,6,8,14,15,16,17,18,32 and
17 41) ADIDAS® NIKE® AMAZON® SPREADSHIRT® and FASO® all have sold
18 their own clothing with the word hustler on it. The word hustler is synonymous
19 with the pool industry as far back as 1915, is a commonly used word in the music
20 and other industries. The word HUSTLER also relates to the sex industry and
21 someone who sells sex (See Appx. D95 ; Exhibit's (33,39 and 40). Not
22 secondary meaning as the plaintiff's claim. The word hustler also has a meaning
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1 of a male prostitute, someone who sells sex, the clear link between what the word
 2 and the sex industry and the male prostitute **or hustler** (Larry Flynt) The most
 3 common stereotype of the hustler is as a **tragic figure, under-aged** or teen-age
 4 **"street kid" or "runaway" forced to leave home because of his sexual**
 5 **orientation or because of sexual abuse. He is often portrayed as a drug addict**
 6 **or thief. The male prostitute has also been portrayed as an idealized rebel living**
 7 **outside the law and free of bourgeois conventions.** This almost Nietzschean
 8 **image of the hustler as moral and sexual outlaw. Flynt confirms this in**
 9 **interviews. (See Appx. D95 ; Exhibit's (33,39 and 40).** Flynt believes his
 10 different attitude to sex was born in those hills. **He ran away at the age of 15.** As
 11 a young man, he charged around aimlessly, **"nagged by an inferiority complex",**
 12 **hemorrhaging rage.** . But he can still remember the birth of Hustler. Flynt set up
 13 a series of **strip clubs**, where he bragged: **"I'm selling pussy by the glass." He**
 14 **was taking amphetamines the whole time** and was sexually "insatiable,
 15 sometimes having **sex with a different woman every four or five hours"**. He
 16 strived to provoke people into rethinking the puritanical morals associated with
 17 sex. **"I have always rebelled against authority"** Flynt **talked openly of massive**
 18 **orgies.** "In a way, I felt like I was on board a pirate ship, like I was in this
 19 swashbuckling, **libertarian outlaw crew.**" "It was kind of an amazing time to be
 20 at Hustler," says MacDonell. "Larry wasn't necessarily talking truth to power, but
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1 he was talking rage to power." He was an explorer on the outer edges of the First
 2 Amendment, testing just how far free speech protections could be stretched. **The**
 3 **same free speech he is saying he owns, with the word hustler.** End this lawsuit
 4 and prevent a **trademark bully** like Plaintiff from proceeding any further. Dismiss
 5 on the grounds that the generic term "hustler" is not protectable, nor does Plaintiff
 6 own it.⁷ Consequently, Plaintiff cannot state a claim for trademark
 7 infringement, false designation of origin, trademark dilution or anticybersquatting
 8 based on defendants' use of this generic term, "Hustler" is not protectable. He
 9 earned his living as a pool hustler. Plaintiff cannot have exclusive rights to the
 10 term.⁸ Moreover, there is accordingly nothing unlawful defendant's use of the
 11 generic verb hustler for the pool industry. This lawsuit concerns the alleged
 12 unauthorized use of a generic term "hustler" which is purportedly the exclusive
 13 property of Plaintiff for "clothing" Hustler state was registered for clothing 9
 14 years before hustler. Also not required to accept as true allegations that contradict
 15 facts which may be judicially noticed by the court, Warren v. Fox Family

23 ⁸ The plaintiff is not allowed to own the word hustler The law does not permit a
 24 common generic term to be removed from common and pervasive use so that a
 25 single company may profit. With this lawsuit, Plaintiff attempts to extend its
 26 market power to control the use of a common generic term by asking this Court to
 27 issue an order which will effectively appropriate to Plaintiff's exclusive use a
 28 common, functional term frequently used by pool players way before LFP went
 into business, other hustlers in other industries. Plaintiff has no right entitling it to
 such relief.

Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). A court is plaintiff's trademark infringement, false designation of origin, trademark dilution and anticybersquatting should be dismissed because it does not own the word "HUSTLER" Toho Co., Ltd. v. Sears, Roebuck & Co., 645 F.2d 788, 790-91 (9th Cir. 1981) (affirming dismissal of Lanham Act claim on motion to dismiss because no likelihood of confusion); CES Publ'g Corp. v. St. Regis Publ'ns, Inc., 531 F.2d 11, 15 (2d Cir. 1975) (granting motion to dismiss because "Consumer Electronics Monthly" is not protected mark); Finger Furniture Co., Inc. v. Mattress Firm, Inc., 2005 WL 1606934, *2-3 (S.D. Tex. 2005) (dismissing because mark at issue was not protectable). Plaintiff does not own the word hustler, as a matter of law, it is irrelevant how much money Plaintiff has spent on promotion, no amount of advertising, can convert the generic term into a trademark. See Perini Corp. v. Perini Constr., 915 F.2d 121, 127 (4th Cir. 1990); Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 464 (4th Cir. 1996); Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 79 (7th Cir. 1977); see also Miller Brewing Co. v. Falstaff Brewing Corp., 655 F.2d 5, 8 (1st Cir. 1981) Even if some consumers may happen to associate a generic term with a specific company (which consumers don't) this merely establishes "de facto secondary meaning," which is irrelevant to a trademark analysis: A showing of "secondary meaning," no matter how strong, can never earn trademark status for a generic

word. This fact that has led to the phrase “de facto secondary meaning.”; Am. Online Inc. v. AT&T Corp., 64 F. Supp. 2d 549, 557 (E.D. Va. 1999) aff’d in part, vacated in part, 243 F.3d 812 (4th Cir. 2001); Cont’l Airlines, Inc. v. United Air Lines, Inc., 53 U.S.P.Q.2d 1385 (TTAB 1999). Stulbarg Int’l Sales Co. v. Brush & Co., 240 F.3d 832, 840 (9th Cir. 2001) (The word Hustler is nothing more than a generic noun/verb which is not entitled to protection. See, Miller Brewing Co., 561 F.2d at 80 (the adjective “light” is a generic term). Just as one producer may not use unfair competition law to prevent others A.J. Canfield Co. v. Honickman, 808 F.2d 291, 307 (3d Cir. 1986); see also Am. Online, Inc. v. AT&T Corp., 243 F.3d 812, 820-23 (4th Cir. 2001) Plaintiff cannot pluck the word “hustler” from the public domain and preclude others from using that verb. Miller Brewing Co., 561 F.2d at 80; A.J. Canfield, 808 F.2d at 307; Am. Online, 243 F.3d at 820. Consequently, Plaintiff cannot state a claim based on defendant's use of the term hustler. Ordinary, everyday expressions are repeatedly denied trademark status. See Reed v. Amoco Oil Co., 611 F. Supp. 9, 12 (M.D. Tenn. 1984) Leadsinger, Inc. v. BMG Music Publ’g, 512 F.3d 522, 532 (9th Cir. 2008) see also Chem. v. New York Life Ins. Co., 168 F.3d 498 (9th Cir. 1999) In re All Terrain Vehicle Litig., 771 F. Supp. 1057, 1062 (C.D. Cal. 1991)

For all of the reasons set above, the defendant respectfully requests that this Court dismiss in favor of the defendant.

B. Plaintiff’s Argument in Response to Defendant’s Motion to Dismiss:

A. The HUSTLER® Mark is Not Generic.

Defendant misconstrues the meaning of “generic” and does not appreciate that the HUSTLER® registration for apparel items, and other HUSTLER® registrations, are deemed incontestable under the Lanham Act. As stated previously, the effect of incontestable status under the Lanham Act is that the registration goes beyond prima facie evidence to become “conclusive evidence” of the ownership, validity, and exclusive right to use the mark. See, 15 U.S.C. §1115(b). However, without pleading this claim or defense in his Answer, Defendant now seeks to attack the validity of the HUSTLER® mark without a proper basis whatsoever.

In the context of the sale of apparel items, the HUSTLER® mark is arbitrary, making the mark a strong mark when considering the spectrum of marks. As stated in the Manual of Model Civil Jury Instructions, for the District Courts of the Ninth Circuit, 2007 Edition (“Jury Instructions”), such marks “involve the arbitrary, fanciful or fictitious use of a word to designate the source of a [product].” (p. 307). On the other hand, a generic mark refers to a general name of a particular product. For example, “[t]he word ‘apple’ can be used as a generic name and not be entitled

1 to any trademark protection. This occurs when the word is used to identify the
2 fruit from an apple tree... [a]s applied to the fruit, ‘apple’ is simply a commonly
3 used name for what is being sold” (Jury Instructions, p. 309). Here, in the context
4 of clothing items, HUSTLER® is a brand and not a generic, general name for a
5 type of apparel.
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12 **B. Defendant Has Not Pled his Claim that the Subject Mark is Generic;**
13 **this Issue Should Not be Heard.**
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15 Defendant Brett attempts to raise, for the first time on the present motion for
16 summary judgment, the assertion that the HUSTLER® mark is a generic mark
17 and is not entitled to protection. This late-in-the-game argument must be rejected
18 by the Court. Defendant Brett failed to raise the issue of a “generic mark”
19 anywhere in the previous pleadings herein. Accordingly, Defendant Brett cannot
20 raise a new issue for the first time as either a basis for granting or denying a
21 motion for summary judgment (or a “Motion to Dismiss” as Defendant
22 characterizes it). The case law clearly establishes that such action is improper
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1 whether Defendant Brett bears the burden of proof as to a counterclaim or an
2 affirmative defense.

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4 Rule 8 of the Federal Rules of Civil Procedure states that “[a] pleading that
5 states a claim for relief must contain: ...a short and plain statement of the claim
6 showing that the pleader is entitled to relief...” Similarly, concerning defenses,
7 Rule 8 also states “[i]n responding to a pleading, a party must: ...state in short and
8 plain terms its defenses to each claim asserted against it” and “[i]n responding to a
9 pleading, a party must affirmatively state any avoidance or affirmative defense...”
10 or it is waived. *See In re Adbox, Inc.*, 488 F.3d 836, 841 (9th Cir. 2007). Federal
11 Rule of Civil Procedure Rule 8(a)(2) requires that the allegations in the complaint
12 give the defendant fair notice of what the plaintiff’s claim is and the grounds upon
13 which it rests. *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir.
14 2006). A party has not provided fair notice of his claim when he brings new
15 allegations for the first time in opposition to a motion for summary judgment. *See*
16 *Id.*, at 969.

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18 The court should not consider claims raised for the first time at summary
19 judgment which the party did not raise in their pleadings. *See Coleman v. Quaker*
20 *Oats Co.*, 223 F.3d 1271, 1292 (9th Cir. 2000) (“A complaint guides the parties’
21 discovery, putting the defendant on notice of the evidence it needs to adduce in
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1 order to defend against the plaintiff's allegations."); *see also Pickern v. Pier 1*
 2 *Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (noting that plaintiff could
 3 not raise new factual allegations at summary judgment because allegations not
 4 included in the complaint failed to "give the defendant fair notice of what the
 5 plaintiff's claim [were] and the grounds upon which [they] rest[ed]," as required
 6 by Rule 8(a)(2) of the Federal Rules of Civil Procedure).
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 10 Allowing a party to seek summary judgment on an unpled claim would be
 11 unfair. *See Bullard v. Wastequip Mfg. Co. LLC*, 2015 U.S. Dist. LEXIS 186456
 12 (C.D.Cal. Apr. 14, 2015). A party may not circumvent Rule 8's pleading
 13 requirements by asserting a new allegation in response to a motion for summary
 14 judgment. *Id.* When "the complaint does not include the necessary factual
 15 allegations to state a claim, raising such claim in a summary judgment motion is
 16 insufficient to present the claim to the district court." *Navajo Nation v. U.S. Forest*
 17 *Service*, 535 F.3d 1058, 1080 (9th Cir. 2008); *see, e.g., Wasco Prods., Inc. v.*
 18 *Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary
 19 judgment is not a procedural second chance to flesh out inadequate pleadings.");
 20 *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006)
 21 (complaint failed to satisfy F.R.Civ.P. 8(a) because it "gave the [defendants] no
 22 notice of the specific factual allegations presented for the first time in [the
 23 plaintiff's] opposition to summary judgment").
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1 Here, as the party bearing the burden of proof on his claim alleging
2 HUSTLER® is a generic mark, Defendant Brett was required to plead his claim,
3 supported by sufficient allegations, to give Plaintiff fair notice of the bases of his
4 counterclaim. Defendant Brett's Answer contained no factual allegations
5 concerning Hustler as a generic mark. Plaintiff first learned of this allegation as a
6 grounds for Defendant Brett's during the process of preparing this Joint Motion for
7 Summary Judgment. Defendants waive their defenses when their Answer is
8 insufficient to put plaintiffs on notice of the particular defense and the lack of
9 notice results in an inability to conduct discovery on the issue by plaintiffs. *Lopez*
10 *v. G.A.T. Airline Ground Support, Inc.*, 2010 U.S. Dist. LEXIS 73029 (S.D. Cal.
11 Jul. 19, 2010).

12 Further, when a party seeks to raise an affirmative defense after the scheduling
13 order's cutoff for amended pleadings, the party must meet not just the liberal
14 standard for amended pleadings in Federal Rule of Civil Procedure 15(a), but the
15 stricter "good cause" standard under Federal Rule of Civil Procedure 16(b). See
16 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 952 (9th Cir.
17 2006). Unlike Rule 15(a)'s liberal amendment policy, which focuses on undue
18 delay and prejudice to the other party, Rule 16(b)'s "good cause" standard centers
19 on the moving party's diligence. *Johnson*, 975 F.2d at 609.

Here, there is clearly prejudice to Plaintiff in having to face, for the first time, on summary judgment Defendant Brett's defense based upon the allegation that HUSTLER® is a generic mark and is not entitled to protection. This claim was not found in Defendant Brett's prior pleadings, and Plaintiff has not had an opportunity to elicit discovery from Defendant Brett on the issue. Similarly, even if Defendant Brett were to seek to amend his pleadings to include this defense or claim, he fails to meet the necessary standard permitting him to do so. Even were this Court to find "good cause" under Rule 16 permitting an amendment, Rule 15 still bars amendment given the aforementioned prejudice to Plaintiff through lack of notice of the defense and inability to conduct discovery on the issue.

Dated: April 20, 2017

MARK S. HOFFMAN, A
PROFESSIONAL CORPORATION

LIPSITZ GREEN SCIME CAMBRIA LLP

By: /s/ Jonathan W. Brown
Jonathan W. Brown, Esq.
Attorneys for Plaintiff LFP IP, LLC

Dated: April 20, 2017

By: /s/ Lee Keith Brett
Lee Keith Brett
Pro Se Defendant